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IN THE CIRCUIT COURT OF FAYETTE COUNTY, WEST VIRGINIA

CLARENCE T. COLEMAN ESTATE
by Co-Administrators, CLARENCE COLEMAN
and HELEN M. ADKINS,

PLAINTIFFS,**VS.**

CIVIL ACTION NO. 05-C-182
Paul M. Blake, Jr., Judge

R. M. LOGGING, INC.,
a West Virginia Corporation, and
CLONCH INDUSTRIES, INC.,
a West Virginia Corporation, and
JOHN ROBINSON, individually,

DEFENDANTS.

**ORDER GRANTING SUMMARY JUDGMENT MOTIONS
OF R. M. LOGGING AND JOHN ROBINSON**

On August 25, 2006, came the parties, by counsel, on R.M. Logging, Inc. and John Robinson's Motion for Summary Judgment. R.M. Logging, Inc. and John Robinson have been sued under the deliberate intent exception to the statutory immunity granted by the West Virginia Workers' Compensation Act codified in W.Va. Code §23-4-2. The Defendants argued that, as a matter of law, the facts of this case do not fit within the statutory exception to the immunity granted to employers by the Workers' Compensation Act. Plaintiffs have claimed that R.M. Logging, Inc. and John Robinson had a subjective realization of an unsafe condition and failed to properly train Plaintiff to recognize the hazards of the workplace. Based upon a review of the court file, statutory and case law, considering the briefs and oral arguments of the parties, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Plaintiffs, Clarence Coleman and Helen M. Adkins, instituted this action on June 17, 2005, as parents and Co-Administrators of the Estate of Clarence T. "Arnos" Coleman (hereinafter decedent), who was an employee of R.M. Logging, Inc., at the time of his death. On December 2, 2003, Decedent was working on a timbering site cutting trees. He cut a tree, which became lodged in a limb, causing the butt end of the tree to be suspended in air. For reasons unknown, Decedent walked directly underneath the butt end of the hanging tree and was fatally wounded when the supporting limb snapped and the tree struck him on his head.
2. It is undisputed that R. M. Logging, Inc. paid into the Workers' Compensation Fund at the time of such accident and that in order for R. M. Logging, Inc. and John Robinson to lose immunity, Plaintiffs must satisfy all five (5) elements of W.Va. Code §23-4-2. The Court finds that the West Virginia Legislature intended for W. Va. Code § 23-2-6 (1991) to provide qualifying employers sweeping immunity from common-law tort liability for negligently-inflicted injuries. Such immunity is not easily forfeited.
3. R.M. Logging, Inc. had a certified logger on the work crew, John Robinson, who oversaw the daily activities of R.M. Logging, Inc.
4. Decedent had one (1) year of experience as a timber cutter before being hired by R.M. Logging, Inc. and received training, instructional materials and guidance after being hired by R. M. Logging. (See Depo of John Robinson at pp. 38-43)
5. Plaintiffs have failed to produce any evidence that R.M. Logging, Inc., through its supervisor, John Robinson, was aware that Decedent had felled a tree which became stuck and that Decedent would choose to walk under that tree. Further, no evidence was produced showing

that it was the custom, habit or practice of R. M. Logging to require its employees to routinely pass under suspended trees.

6. Plaintiffs assert that Decedent was not properly trained in order to understand that he should not walk under a hanging tree. However, Plaintiffs have no evidence to offer the Court concerning what training Decedent actually had. Plaintiffs assert that because this tragic accident occurred that, *ipso facto*, the Decedent was not properly trained.
7. Although OSHA issued several citations to R.M. Logging, Inc. as a result of this accident, the Court finds that OSHA citations do not equate with lack of training or with subjective realization. Further, such citations do not equate to a finding of deliberate intention on the part of R. M. Logging to injure the Decedent.
8. W.Va. Code § 23-4-2 specifically directs trial courts to scrutinize deliberate intent actions and grant summary judgment when appropriate.

CONCLUSIONS OF LAW

1. Workers' Compensation is the exclusive remedy of an employee who was injured while acting within the course and scope of his employment. W.Va. Code §23-4-2 was intended to remove from the common law tort system all disputes between or among employers and employees regarding the compensation to receive for injury or death to an employee except as expressly provided in this chapter.
2. It was the legislative intent to promote prompt judicial resolution of the question of whether a suit prosecuted under the asserted authority of this section is or is not prohibited by the immunity granted under this chapter. W.Va. Code §23-4-2(d)(1).

3. The immunity from suit may be lost only if the employer or person against whom liability is asserted acted with deliberate intention. This requirement may be satisfied only if the following can be proven:

- (A) That a specific unsafe working condition existed in the workplace which presented a high degree of risk and a strong probability of serious injury or death;
- (B) That the employer had a subjective realization and an appreciation of the existence of the specific unsafe working condition and of the high degree of risk and the strong probability of serious injury or death presented by the specific unsafe working condition;
- (C) That the specific unsafe working condition was a violation of a state or federal safety statute, rule or regulation, whether cited or not, or of a commonly accepted and well-known safety standard within the industry or business of the employer, which statute, rule, regulation or standard was specifically applicable to the particular work and working condition involved, as contrasted with a statute, rule, regulation or standard generally requiring safe workplaces, equipment or working conditions;
- (D) That notwithstanding the existence of the facts set forth in subparagraphs (A) through (C), inclusive, of this paragraph, the employer nevertheless thereafter exposed an employee to the specific unsafe working condition intentionally; and
- (E) That the employee exposed suffered serious injury or death as a direct and proximate result of the specific unsafe working condition.

W.Va. Code §23-4-2(d)(2)(ii).

4. The Court must dismiss an action upon motion for summary judgment if it finds one or more of the facts required to be proved by the provisions of Subparagraphs (A) through (E),

inclusive, of this subsection do not exist. To do otherwise would effectively negate the protection afforded employers who subscribe to Workers' Compensation.

5. A plaintiff attempting to impose liability on an employer under the deliberate intent provision of the Workers' Compensation statute faces a high burden and must present sufficient evidence, especially with regard to the requirement that the employer had a subjective realization and an appreciation of the existence of such specific unsafe working condition and the strong probability of serious injury or death presented by such specific unsafe working condition. *Deskins v. S.W. Jack Drilling Co.*, 215 W.Va. 525, 600 S.E.2d 237; *Marcus v. Holley*, 618 S.E.2d 517, 529 (W.Va. 2005).
6. This requirement is not satisfied merely by evidence that the employer reasonably should have known of the specific unsafe working condition and of the strong probability of serious injury or death presented by that condition. Instead, it must be shown that the employer actually possessed such knowledge. *Marcus v. Holley, supra*.
7. The Court concludes, as a matter of law, that there is no evidence in this case to meet the requirement of subjective realization, as there is no evidence that R.M. Logging, Inc. was aware of the suspended tree, and that Decedent would walk underneath it.
8. Evidence of conduct which constitutes negligence, no matter how gross or aggravated or willful, wanton or reckless, will not support a deliberate intent cause of action. W.Va. Code §23-4-2(C)(2)(i).
9. An employee attempting to impose liability on an employer under the "deliberate intention" provision of the Workers' Compensation statute cannot satisfy the requirement that an employer had subjective realization and appreciation of the existence of a specific unsafe working condition and the strong probability of serious injury or death presented by such

condition merely by evidence that an employer reasonably should have known of a specific condition and of a strong probability of injury or death presented by a condition, but rather it must be shown that the employer possessed such knowledge. *Deskins v. S.W. Jack Drilling Co.*, supra.

10. Plaintiffs' conclusion or allegation that Decedent was not properly trained simply because an accident happened is insufficient proof as a matter of law.
11. Plaintiffs have failed to produce any evidence that there was a specific unsafe working condition (one tree suspended in another tree) in the workplace that was created by or known to the employer. The only unsafe working condition which existed was Decedent's act of walking underneath a suspended tree. Training is not required for a person of ordinary intelligence to recognize the hazard of walking under a tree suspended in the air by a limb from another tree. In contrast to case law cited by Plaintiffs, this case is without a shred of evidence to suggest that the employer was aware of one tree hung up within another tree, and when fully apprised of such fact, then made a decision to require or permit Decedent to walk underneath such dangerous condition.
12. Therefore, the Court finds that Plaintiffs have failed to satisfy the requirements of W.Va. Code §23-4-2(d)(2)(ii), in failing to produce any evidence of subjective realization and appreciation of the existence of a specific unsafe working condition. Further, Plaintiffs have failed to produce evidence that the employer intentionally exposed Decedent to unsafe working conditions.
13. The Court also finds that Plaintiffs have failed to produce any evidence to show that the employer acted with a deliberate intent to expose Decedent to an unsafe condition and appreciated the danger to Decedent, or that the employer created an unsafe condition.

THEREFORE, it is **ORDERED, ADJUDGED, and DECREED** that R. M. Logging, Inc. and John Robinson's Motions for Summary Judgment are **GRANTED**.

The objections and exceptions of all parties aggrieved by this Order are noted and preserved.

The Circuit Clerk is directed to send an attested copy of this Order to all counsel of record by facsimile transmission and by United States mail.

ENTERED this 20th day of September, 2006.



PAUL M. BLAKE, JR., JUDGE

A TRUE COPY of an order entered
Sept. 20, 2006
Tested: Daniel Wright
Circuit Clerk, Payson County, WY